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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 480

DENIA M. FAWCETT, Administratrix of the Estate of Floyd S. Fawcett,

Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Denia M. Fawcett, Administratrix of the estate of Floyd S. Fawcett, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 22, 1965. Her petition for rehearing was denied on May 27, 1965.

OPINIONS BELOW

The opinion of the District Court (R. 135-145) is unreported, although it will be published. The opinion of the Circuit Court of Appeals (Appendix, *infra*, pp. 27-28) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1965. (Appendix, *infra*, p. 29.) A petition for rehearing filed by Denia M. Fawcett on May 13, 1965 (R. 170-178), was denied on May 27, 1965. (Appendix, *infra*, p. 31.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

The question presented is whether the decision of the Fifth Circuit Court of Appeals affirming the granting by the District Court of a motion for summary judgment filed by Missouri Pacific Railroad Company, respondent, should be reversed. Otherwise stated, the question is whether the deceased, Fawcett, *might or could have been* an employee of the respondent within the meaning and for purposes of application of the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60 and, more specifically, whether that issue may sustainably be resolved adversely to the administratrix, and a jury trial denied to her, on motion for summary judgment filed under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

STATUTE INVOLVED

The statutory provisions herein involved are Sections 2 and 5 (or, more precisely with respect to the latter section, the first sentence thereof), of the Federal Employers' Liability Act, reading as follows:

45 U. S. C., Section 52:

"Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal

Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, Sec. 2, 35 Stat. 65."

45 U. S. C., Section 55:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66."

STATEMENT OF THE CASE

This action is brought under the Federal Employers' Liability Act, 45 U.S.C.A. Sections 51-60, seeking recovery of damages for the death of Floyd S. Fawcett, by his widow, Denia M. Fawcett, as administratrix of her deceased husband's estate. The plaintiff brings this action on behalf of herself, as widow, and for the benefit of her minor child, Shelly Ann Fawcett, who was 13 years of age at the time suit was filed herein in June, 1962.

On December 4, 1961, Floyd S. Fawcett, the deceased husband of the plaintiff, was killed when he was crushed between two railroad "piggy-backs" or vans (Exhibit 3, inserted in the back of the transcript of the record). The complaint alleges that the decedent was an employee of respondent, Missouri Pacific Railroad Company, for purposes and within the scope of the Federal Employers' Liability Act. The decedent had driven a piggy-back upon a flat railroad car belonging to respondent situated on its track in its yard at Kinder, Louisiana, and was standing behind it on the railroad car when he was hit and killed by another piggy-back or van being driven by one Luke Bushnell on the same railroad flatcar.

The respondent, Missouri Pacific Railroad Company, filed a motion for summary judgment bottomed upon the proposition that Floyd S. Fawcett had not been its employee and that, consequently, no relief could be had under FELA. Certain evidence was submitted by both parties in connection with the motion. This evidence showed without dispute that the decedent was regularly an employee of Missouri Pacific Freight Transport Company, a Texas corporation, and was paid by it.

It was and is the position of petitioner that for purposes of the protective ambit of FELA the decedent was an employee of respondent at the time that he was accidentally killed.

The District Court upheld the motion filed by respondent and granted summary judgment in its favor. A motion by petitioner for a new trial was overruled. An appeal to the United States Court of Appeals for the Fifth Circuit followed which affirmed the judgment of the lower Court and subsequently overruled petitioner's motion for a rehearing.

REASONS FOR GRANTING THE WRIT

1.

The decisions below in this cause are directly in conflict with the *ratio decidendi* in *Sinkler v. Missouri Pacific R. Co.*, 1958, 356 U. S. 326, 2 L. Ed. (2d) 799, 78 S. Ct. 758, and *Baker v. Texas & P. R. Co.*, 1959, 359 U. S. 227, 3 L. Ed. (2d) 756, 79 S. Ct. 664.

In the *Sinkler* case Houston Belt and Terminal Railroad Company employed switching crews and other personnel, and owned and operated the facilities and rolling stock, used in switching operations in railroad yards in Houston. Sinkler, himself, was an employee of Missouri Pacific but he was injured not by any negligence on the part of Missouri Pacific itself or by the negligence of any persons who were the employees of Missouri Pacific by virtue of being on its payroll. He was hurt as a result of negligence on the part of employees of Houston Belt and Terminal Railroad Company. In order for Sinkler to recover under FELA it was necessary for the Court to decide

affirmatively (which it did) the question of whether or not his injuries resulted, as required by Section 2 of the Act, "from the negligence of any of the officers, agents, or employees of such carrier". The status of Sinkler himself was not in any way at issue.

The Court said that the switching operations performed by the employees of Houston Belt were conducted "to further the task of the respondent's enterprise." And then follows this language: "While engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA as much a part of the respondent's total enterprise *as was the petitioner* while engaged in his regular work on the respondent's car." (Emphasis supplied.)

In *Baker v. Texas & P. R. Co.*, 359 U. S. 227, the plaintiff had been employed by W. H. Nichols & Co., Inc., contractor, to do grouting work on the track of the defendant railroad. While so engaged he was struck and killed by a train. A trial of the matter was begun but the Texas trial Court declined to submit the matter to the jury, holding as a matter of law that Baker was not in such a relationship to the railroad at the time of his death as to entitle him to the protection of the Act. An intermediate Court affirmed the trial Court's judgment for the railroad and the Texas Supreme Court refused an application for a writ of error.

This Court reversed, holding, *inter alia*, that the issue of whether grouting work was part of the maintenance task of the railroad should be submitted to the jury.

It was also noted that the Act does not use the terms "employee" and "employed" in any special sense, so that the familiar general legal problems as to whose "employee" or "servant" a worker is at a given time present themselves as a matter of federal law under the Act.

In the instant cause the decedent, immediately before his death, had completed placing, with the use of a tractor, an empty "piggy-back" on a flat car belonging to respondent. He was standing on the railroad flat car near one end of the piggy-back when he was hit and killed by another piggy-back or van being moved upon the same flat car by another worker, one Luke Bushnell, who was also on the payroll of Missouri Pacific Freight Transport Company.

A piggy-back or van is a special container or receptacle for the carrying of freight and is so designed that it may readily be placed upon a specially constructed chassis equipped with wheels. In fact, it is when this is done that the container or van and the chassis together are called a "piggy-back". In essence it serves the purpose of a freight car or boxcar except, of course, that it can be moved on and off a flat car and along roads and highways. At the time of his accidental death the decedent was placing respondent's empty piggy-back upon respondent's railroad flat car, standing upon respondent's trackage, resting upon respondent's premises, to be picked up by respondent's locomotive for eventual reloading and use in respondent's railroad business. We know of no dispute on any of these points.

The railroad is obligated in a practical sense by its charter to transport and deliver freight. For that purpose

its empty railroad cars must be moved back to a point where they can again serve the purpose of the railroad, and obviously that is also true of the containers or piggybacks. When Floyd Fawcett was putting the empty piggyback upon the railroad car he was doing work that the railroad was required to do and which was just as integral a part of respondent's total enterprise and operational activities as is the work done by one of its locomotive engineers. In fact, it may be said that the work he was doing was of a type constituting the *raison d'etre* of railroading, especially since railroad passenger traffic continues to dwindle. This statement applies with equal force of course to the work being done by Luke Bushnell when he negligently tractored one empty van against another, crushing the decedent in the process. Both men were at that time employees of the railroad for purposes of the Act. Certainly the work that Fawcett was doing at the time of the accident was furthering in a most direct sense the business of the railroad and exposing him, along with other railroad workers, to the risks of the common or unitary enterprise of the respondent.

There are cases other than Sinkler and Baker holding that in interpretations of the FELA the word "employee" is not to be taken in any special, constrictive sense. The contrary view would permit to a large degree the unfortunate emasculation of the protective purposes of the Act. If at the time of the accident Fawcett and Bushnell had been on the payroll of the railroad there could be no dispute. Is the fact that they were on the payroll of another (a wholly owned subsidiary company) sufficient to permit it to be said that there can be no questions for a jury—that a motion for summary judgment may be

granted? The fact that they were employees of the transport company does not preclude the existence also of such an employee-employer relationship as between them and the railroad as to warrant applying the FELA.

In *Ward v. Atlantic Coast Line R. Co.*, 1960, 362 U. S. 396, 4 L. Ed. (2d) 820, 80 S. Ct. 789, this Court reversed the Fifth Circuit under circumstances not nearly so convincing for permitting application of the Act as in the instant matter. Needless to say, in Ward the petitioning employee was not being paid by the railroad for the work he was doing at the time he sustained an accidental injury. The trial court's instructions to the jury were reversibly constrictive in limiting inquiry, in effect, to the question of whether the petitioner was aware that the railroad considered him not to be working for it but for some third party.

A case which permitted the implementation of the controlling principles as approved by this Court, and here germane, is *Byrne v. Pennsylvania R. Co.*, 3 Cir. 1959, 262 F. (2d) 906, where the decedent, Joe G. Irby, an employee of Westinghouse Electrical Corporation, was engaged at the time of the fatal accident in "follow-up" services on an electric locomotive standing in the car shops of the railroad, which had been sold to it by Westinghouse. Irby had never been employed by the railroad. He was a skilled electrical engineer whose extensive overtime work was authorized only by Westinghouse.

He took work assignments from Westinghouse personnel, by whom he was supervised and to whom he made regular work reports. He was deemed by officials of Westinghouse to be doing work for its benefit.

The Court observed: "There is, of course, no question but that Irby was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad." In determining this, the Court emphasized that the question of "*whose work is being done*" is a most important factor and stated: "As has been said, immediately preceding his death he was engaged in work on an electric locomotive owned by the Railroad and used by it in interstate commerce. The repairs which he was engaged in making were necessary for the maintenance of the Railroad's services." In the course of its decision upholding the instructions of the District Court and the verdict of the jury in favor of the administratrix, the Court cited a number of authorities.

We submit that the holding of the Third Circuit in Byrne is in direct conflict with the ruling that has been made below in this matter by the Fifth Circuit.

We submit that if the work of clarification and guidance undertaken by this Court in Sinkler, Baker, and Ward is not to be lost but rather is to find practical, meaningful application in the Courts of the land, a writ of certiorari should be granted in this matter. If misunderstanding and misapprehension of those cases is to be prevented and a consequent erosion of the salutary rationale for which they stand to be avoided, we earnestly believe that rationale should be re-declared now against the backdrop of the context and posture of this litigation, through the granting of a writ.

With respect to this first reason for granting a writ, it would make no difference of course if the railroad

did not own a single share of the capital stock of the transport company. With all respect, we are convinced that the Courts below did not appreciate and apply the principle of "whose work is being done".

The facts here go so very far. Possibly the loading and unloading of freight, for example, is not such work as to innately require, as it were, the application of FELA. Perhaps, as to such work, "right of control" or "control" is a concomitant factor that must be found to exist. If the dual elements relating to work and control exist, the FELA applies as a matter of law. While both factors do exist here, the point we are trying to illuminate is that the work Floyd Fawcett was doing was of such a nature as to result, in and of itself, in the creation of a relationship between him and the railroad requiring, also as a matter of law, we think, FELA application. After delivery of freight by freight car it is necessary that the empty car be taken to a point where it can again be used to serve the purpose of the railroad and obviously this applies equally to a container or piggy-back that is used to transport freight. When the decedent was killed as he was returning an important piece of basic railroad equipment to a place on its tracks where, in accordance with instructions of railroad personnel, it had to be deposited as a part of the continuing task of conducting the enterprise and fulfilling the charter purposes of respondent.

2.

The decision of the Court below is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Latsko v. National Carloading Corp., et al* and *Erie R. Co., v. Latsko*, 1951, 192 F. (2d) 905, and other decisions of

that court as well as of other circuit courts, as we shall later show. Of much importance, of course, in connection with this second reason for the granting of a writ of certiorari herein, is the plain language of Section 5 of the Act, being 45 U. S. C., Section 55, printed at page 3, *supra*. In the cited case Latsko, claiming under FELA against Erie Railroad, was injured while in the employ of National Carloading Corporation. The ownership by Erie of all of the stock of National, "thereby enabling itself to control the operations of the latter company", was alone held sufficient to require the refusal of a motion by Erie for summary judgment.

Respondent here owned all of the stock of the Missouri Pacific Freight Transport Company which certainly a jury might determine with propriety was not an independent contractor but rather, indeed, an agent of the railroad over whose employees the latter had a right of control. Not only did it have the right of control but according to a deposition and affidavits introduced in evidence the railroad actually did control and supervise the employees of the transport company, including Fawcett. Let us first, however, discuss the documentary evidence.

A copy of the basic operating agreement between the respondent and the transport company begins at page 36 of the transcript of the record, as prepared for the appeal to the Fifth Circuit. Supplemental agreements numbered 1 through 4 appear in the appeal record immediately preceding the Basic Agreement itself, whereas the last supplemental agreement that was introduced by respondent, labeled "Supplemental Agreement No. 5," dated Sep-

tember 13, 1962, is found in the record immediately following the basic contract.

The contract is not so much "cost plus" as it is simple cost reimbursement, "such cost to include actual cost of labor and materials, plus all payroll taxes and percentage additions . . . general supervision, accounting, use of small tools, and other elements of expense not readily susceptible of exact ascertainment . . . and . . . all retroactive wage increases". All equipment except tractors, shall be supplied by and remain the property of the railroad. The contract spells out many elements of control over the transport company whose position is revealed therein as decidedly less than independent. Paragraph 10 of the Basic Agreement is an obvious self-serving pronouncement that stands in some contrast with the very next and last paragraph (11) thereof:

"10. The Contractor shall employ and direct all persons performing any service hereunder and such persons shall be and remain the sole employes of and subject to the control and direction of the Contractor, and not the employes or subject to the direction and control of the Railroad, it being the intention of the parties hereto that the Contractor shall be and remain an independent contractor and that nothing herein contained shall be construed as inconsistent with that status.

"11. This contract shall take effect April 4, 1956 and shall remain in effect thereafter until terminated by either party giving not less than 30 days' written notice to the other part, provided that the *Railroad* may terminate this agreement *at any time immediately* upon written

notice to the Contractor by reason of any *adverse legislation, order or rule* of any public authority, or in the event the *Contractor's services* hereunder shall be *unsatisfactory* to the *Railroad.* Covenants herein shall inure to or bind each party's successors and assigns; *provided, no right of Contractor shall be assigned, voluntarily or involuntarily, except by express agreement acceptable to Railroad.* Either party may waive any default at any time of the other without affecting, or impairing any right arising from, any subsequent default." (Emphasis added.)

On June 7, 1962 (Floyd S. Fawcett was killed on December 4, 1961), the name of Missouri Pacific Freight Transport Company was changed to Missouri Pacific Truck Lines, Inc. (R. 50). There was no change in the capital stock structure. Only 250 shares of capital stock had been issued by the old transport company, all of which had been owned from the beginning by the railroad, and continued to be owned by it.

Another important facet of this matter is the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission to Missouri Pacific Freight Transport Company in March, 1954 (R. 54). The transport company is limited to service which is auxiliary to, or supplemental of, the rail service of the railroad and its subsidiaries. For an unknown length of time the railroad carried on piggy-back and other freight-handling operations through the transport company (although the name of the latter has been changed two or three times); and for years all of the employees of the transport company were within the coverage and subject to the National Railroad Retirement Act of the United States. That fact

was not even mentioned or alluded to in any evidence produced by the railroad in support of its motion for summary judgment, much less the number of years during which the transport company employees were governed by the Railroad Retirement Act, and *a fortiori* there has been no explanation by the railroad company as to how it accomplished the removal of those employees from Retirement Act coverage. Was it incumbent upon the executrix to ferret out and produce such evidence, in order that such inferences as might be permissible could be drawn therefrom? We call the Court's attention to the affidavit of Mr. A. W. Petrillo taken by the railroad at Dallas (R. 7-9). A reading of that affidavit would never lead one to suspect that Floyd Fawcett for years was covered by the Retirement Act (as indeed was the case). We hardly believe that it is contended by anyone that the widow was required to set up a deposition of Mr. Petrillo at Dallas or St. Louis (R. 15) in order to cross-examine him with respect to the contents of his affidavit, or that she was required, in connection with the motion for summary judgment, to set up depositions at St. Louis of officers of the railroad or of its wholly-owned transport company in order to fill in gaps that exist with respect to such points, among others, as Floyd Fawcett's duties and supervision, and the possible implicit subservience to the railroad of the officers and entire personnel on the payroll of the transport company.

Incidentally, we call the Court's attention to the photograph of one of the respondent's piggy-backs inserted in the back of the transcript of the record. The lettering "Missouri Pacific Lines" appears in two places on the end

of it and the words "Missouri Pacific Truck-Rail Service" are painted on its sides.

We now turn to the testimony of a witness upon the more practical points of the operation between the two companies which appears sufficient within itself to require the overruling of the motion for a summary judgment. The deposition of Alex Courville (R. 60), a truck driver for the transport company, was taken. He had been employed by trucking company subsidiaries of respondent for many years (R. 63). He replaced the decedent, Floyd Fawcett, and has the same job (truck driver and piggy-back handler) that Fawcett had (R. 64). In past years he and other truck drivers were covered by the National Railroad Retirement Act and deductions were made from their earnings as contributions to the Railroad Retirement Fund, even though *they were never employed directly* by respondent or on the latter's payroll (R. 64-65). The truck drivers would go to work at Kinder early in the morning and get waybills for their day's work at the railroad's passenger and freight station (R. 66). The piggy-backs and containers were dropped on side tracks at Kinder by one of respondent's trains. The procedure was for the railroad agent or the check clerk (both on the payroll of the railroad) to give the truck drivers and piggy-back handlers (on the transport company's payroll) a list of the containers and piggy-backs, and a pouch containing all the freight waybills (R. 68-69). The truck drivers took the piggy-backs to the warehouse and unloaded them, and eventually returned them to a flatcar on one of the railroad's sidings in accordance with instructions from the railroad, and pushed or pulled the piggy-backs up onto the flatcar and make them secure. These

truck drivers were then required to turn in the railroad car numbers as well as the piggy-back numbers to the railroad agent or the check clerk (R. 71).

Mr. Courville further explained that if a freight consignee pays a freight charge to a delivering truck driver, the latter is required to turn over the money to the nearest railroad agent (R. 72). Yes, from many aspects, workers like the decedent were in the real sense employees of the railroad. Note this testimony of Courville (R. 72-73, and 75):

"Q. In other words, all this merchandise that comes in that way, it is railroad merchandise, isn't that true?

A. Well, the railroad bills it out and gives it to us and we deliver it and collect money and give it back to the agent, as far as my knowledge.

Q. The agent would in substance control the operations relating to that merchandise as you have described?

A. Yes.

Q. Now, if merchandise is picked up somewhere by a truck driver, then what, he takes it to the railroad station to be weighed and to be billed?

A. Yes, sir, before we get it.

Q. Then it is given to a truck driver who takes it eventually and delivers it wherever it goes, but the money for it has to go to the railroad agent or employee?

A. Yes, sir.

* * *

Q. From what you have said, it appears that all of the freight that was received and delivered or that is picked up actually is handled through the railroad company, the Missouri Pacific Railroad Company in this instance, and is controlled by its employees, would you say that is correct?

A. I would say that is correct. Everything we pick up is handled through the railroad and when we deliver it, it is still handled through the railroad.

Q. You have a certain number of years of seniority it is called, or service, recognized service?

A. I got twenty years.

Q. Does that include all of the time that you have worked, that you have already talked about, including the time when you were under the railroad retirement act and not under social security?

A. That is all of it.

Q. It includes that time as well?

A. Yes, sir."

In addition to giving his deposition, Courville also executed an affidavit (R. 79). eW shall refrain from quoting from it but this affidavit sheds further light upon the nature of the relationship that existed between workers in the category of Fawcett and the railroad, and the degree of control actually exercised by the railroad over such workers.

In their brief to the District Court, counsel for the railroad cited eleven factors, copied from the case of *De-*

Paola v. New York, New Haven & Hartford R. Co., 1961, 198 F. Supp. 12, as determinative of the question of whether or not the administratrix has a right to submit her case to a jury, and then asserted that all of these factors were established favorably to the position of the railroad. The District Court accepted this assertion, and repeated in its own opinion (R. 136-137) ten of the eleven factors. In the interest of space we shall not here set out those factors but the clear fact is that several were affirmatively established favorably to the position of the administratrix rather than conversely. Thus, the railroad premises upon which decedent was working at the time of his accidental death were not the subject of any lease agreement of the railroad, not a single piece of the equipment was under lease to the transport company at the time of the accident, and Fawcett and Bushnell were doing charter work of the railroad which it was required to do. He was not loading or unloading but had just completed, in accordance with instructions from his superiors, employees of the railroad, the placing of an *empty* container or piggy-back belonging to the railroad on its flatcars, standing on its track.

We turn now to additional cases that are in conflict with the decision below. In *Cimorelli v. New York Central R. R. Co.*, 6 Cir. 1945, 148 F. (2d) 575, in holding that Cimorelli, as an employee of an agent of the railroad, might successfully claim the benefits of FELA, the Court, at page 578, observed:

> "The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control ap-

pears, the contractor cannot be independent. Atlantic Transport Co. v. Coney's, 2 Cir., 82 F. 177; Reynolds v. Braithwaite, 131 Pa. 416, 18 A. 1110."

In *Pennsylvania R. Co. v. Roth*, 6 Cir. 1947, 163 F. (2d) 161, certiorari denied, 332 U. S. 830, the railroad engaged another company, which was called an independent contractor in the contract between them, to perform loading and unloading operations, along with other duties. Roth, who was on the payroll of the contractor, was injured while assisting fellow employees of the contractor in loading a crane belonging to the contractor, on a railroad flatcar. The District Court for the Northern District of Ohio held that under a proper interpretation of the contract, and considering the operational activities of the two companies, the contractor was not independent and instructed the jury that *as a matter of law* Roth was an employee of the railroad for FELA purposes. This ruling was upheld.

Pennsylvania R. Co. v. Barlion, 6 Cir. 1949, 172 F. (2d) 710, presents a fact situation and result similar to that found in Roth, although in Roth the contractor was paid on a cost-plus basis to unload, whereas the contractor in Barlion was paid on a straight contract basis. Barlion was hurt while in a gondola car engaged in loading or unloading work. The car had been pushed along the tracks by a "bulldozer". It may be emphasized that ". . . no one from the railroad company supervised him [Barlion], and none of the railroad employees had ever told him what to do." The instruction to the jury that as a *matter of law* Barlion was an employee of the railroad was approved on appeal.

In *Mazzucola v. Pennsylvania R. Co.*, 3 Cir. 1960, 281 F. (2d) 267, a contract had been made by the railroad with McGrath Stevedoring Company, Mazzucola's employer, to unload railroad cars. It does not appear that Pennsylvania owned any of the capital stock of the McGrath company. In the contract the railroad reserved the right to load or unload itself, and to terminate the contract on 10 days' notice. The contractor could not assign the contract without the railroad's consent, and it contained other features similar to the one here involved. It was held that there was sufficient retention of the right of control by the railroad to create an issue as to the question of the employment status of Mazzucola quoad the railroad for FELA purposes. The action of the District Court in granting summary judgment for the defendant was reversed.

It does not appear that the defendant railroad in the Cimorelli, Roth, Barlion, or Mazzucola case owned a single share of the capital stock of the respective contracting companies or (as is true in the instant matter) that there was an interlocking directorate. The District Court cited (R. 139) four cases in which some of the legal consequences of the ownership by one corporation of the stock of another were discussed. None of these cases involved the Federal Employers' Liability Act or summary judgment.

We submit that a writ should be granted not merely because the decision below is in conflict with those cited above from the Sixth and Third Circuits, but because of the importance of a correct and uniform interpretation by the Courts of the nation of a most vital aspect of the Federal Employers' Liability Act. Despite the axiom that

the denial in any case of the application for a writ does not denote approval of the challenged decision of a lower Court, the inevitable result of such a denial is to discourage and inhibit the seeking of redress in similar situations. The FELA is an important law of national scope affecting daily the lives of many people. If the interest in the proper construction and administration of that law that has been manifested heretofore by the Court is to find practical application, we respectfully submit that this is a case in which a writ of certiorari should be granted.

3.

From any view, the action below permitting the use of the motion for summary judgment as the means or method of making a final disposition of this cause is seriously erroneous and should be reversed.

We have not found any decision of this Court discussing the role of summary judgment in a case or context similar to that here presented, which we respectfully suggest may be itself a consideration for reviewing this matter. Summary judgment questions were involved in the antitrust cases of *Poller v. Columbia Broadcasting System*, 1961, 368 U. S. 464, 7 L. Ed. (2d) 458, 82 S. Ct. 484; *United States v. Diebold*, 1962, 369 U. S. 654, 8 L. Ed. 176, 82 S. Ct. 993; and *The White Motor Company v. United States*, 1963, 372 U. S. 253, 9 L. Ed. (2d) 738, 83 S. Ct. 696. These cases emphasize that to permit summary judgment it must affirmatively appear unequivocably that there is no genuine issue on any material fact. In Poller it was said: "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even

handed justice.' " In Diebold is found this expression: "On summary judgment the inferences to be drawn . . . must be viewed in the light most favorable to the party opposing the motion."

In *Mazzucola v. Pennsylvania R. Co.*, 1960, 281 F. (2d) 267, also cited above, it was held that in an action for injuries sustained by the employee of a stevedoring firm when he was crushed between a railroad car and a tractor which had been used to move the car, a fact question, precluding summary judgment, was presented as to whether the plaintiff was entitled to the benefits of the FELA.

Baker v. Texas & P. R. Co., 359 U. S. 227, 3 L. Ed. (2d) 756, 79 S. Ct. 664, cited above, did not involve summary judgment but this language from the decision is nevertheless pertinent: ". . . we think it perfectly plain that the question [nature of the relationship of a worker to the railroad], like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. . . . Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury."

In the instant matter reasonable men can conclude that the decedent was engaged at the time of the accident in respondent's operational service or activity. They can conclude that the railroad had a right of control over the transport company, or that it exercised actual control over the latter's employees. If those statements taken singly

may be termed incorrect, then may not reasonable men find that there is sufficient evidence supporting those combined criteria—"work" and "control"—to bring the relationship of the deceased to the railroad within the purview of the FELA?

But that is not all. It is not necessary on the present state of the record that such a relationship may be found. It is only necessary on the basis of the evidence introduced in connection with the motion for summary judgment that it cannot with certainty be said there is no genuine issue on any material fact. Although even upon the eve of a trial of a case on its merits most lawyers feel that they could and should have done more to develop and present evidence, how much more is that true where the question is only one of summary judgment. Where the motion is filed by a defendant, it may even be unwise for a plaintiff to produce too much evidence, or certain evidence. At any rate, it is only necessary that a mere affidavit provide a basis from which it may be inferred that a genuine issue on some material fact might at a later date on the trial of the matter be developed.

Needless to say, it is not our position that under any circumstances all employees of a subsidiary corporation of a railroad are also the latter's employees for purposes of the Act.

We therefore submit, finally, that a writ of certiorari should be granted herein in order that guidelines might be laid down for determining the controlling con-

siderations and principles applicable to motions for summary judgment in cases of this type.

Respectfully submitted,

August 20, 1965.

.....

JOHN A. HICKMAN,
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Lake Charles, Louisiana,
Attorney for Petitioner.

Of Counsel:
JOSEPH E. BASS,
1039 Common Street,
Lake Charles, Louisiana.

CERTIFICATE

I certify that service of a copy of this petition for a writ of certiorari has been made upon John R. Stewart, Esq., attorney of record for respondent, Missouri Pacific Railroad Company, by mailing the same in the United States post office at Lake Charles, Louisiana, with first class postage prepaid, addressed to him at 1125 Pithon Street, Lake Charles, Louisiana.

August , 1965.

.....

Attorney for Petitioner

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21338

DENIA M. FAWCETT, Administratrix of the Estate of Floyd S. Fawcett,

Appellant,

versus

MISSOURI PACIFIC RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(April 22, 1965.)

Before WHITAKER,* Senior Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM: This appeal is from a summary judgment entered in favor of the defendant Railroad Company in an action under the Federal Employers' Liability

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* Of the Court of Claims, sitting by designation.

Act, 45 U.S.C.A. §§ 51-60. The sole issue was whether the deceased, Fawcett, was an employee of the defendant within the meaning and purpose of the Act at the time of his death. That issue was fully explored by affidavits, oral testimony and exhibits. The district court held that there was no genuine issue of fact. Thinking that no reasonable man could differ with the conclusion that the deceased was not an employee of the defendant at the time he met his death, the district court entered a full opinion, findings of fact and conclusions of law,[1] and granted the defendant's motion for summary judgment.

The various relevant factors under law in determining whether the injured or killed person was an employee of the railroad carrier with respect to the Federal Employers' Liability Act have been ruled several times by the Supreme Court.[2] After careful consideration, we find ourselves in agreement with the opinion, findings, and conclusions of the district court. The judgment is therefore

AFFIRMED.

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[1] Reported in F.Supp.

[2] Baker v. Texas & P. R. Co., 1959, 359 U.S. 227, 228; Ward v. Atlantic Coast Line R. Co., 1960, 362 U.S. 396, 400, reversing Ward v. Atlantic Coast Line R. Co., 5 Cir., 1959, 262 F.2d 75; see also Sinkler v. Missouri Pacific R. Co., 1958, 356 U.S. 326. In each of the two cases first cited in this footnote, the Supreme Court referred to the Restatement of Agency 2nd. §220 for the factors to be considered in each particular case in determining whether a person is an "employee." (See 359 U.S. 228; 362 U.S. 400.) All of the pertinent cases are collected in an extensive annotation in 30 A.L.R.2d, 517-529, and the Supplement Service.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21338

D. C. Docket No. CA-8914

DENIA M. FAWCETT, Administratrix of the Estate of Floyd S. Fawcett,

Appellant,

versus

MISSOURI PACIFIC RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before WHITAKER,* Senior Judge, and RIVES and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Denia M. Fawcett, Administratrix of the Estate of Floyd S. Fawcett, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 22, 1965

.....

Of the Court of Claims,
sitting by designation.
Issued as Mandate: Jun 8, 1965

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21338

DENIA M. FAWCETT, Administratrix of the Estate of Floyd S. Fawcett,

Appellant,

versus

MISSOURI PACIFIC RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(May 27, 1965.)

ON PETITION FOR REHEARING

Before WHITAKER,* Senior Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM: The petition for rehearing filed by the appellant is hereby

DENIED.

. . . . . .

*Of the United States Court of Claims, sitting by designation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 480

DENIA M. FAWCETT, Administratix of the Estate of Floyd S. Fawcett,
Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMANY,
Respondent.

ORIGINAL BRIEF OF RESPONDENT UPON PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM C. DOWDY, JR.,
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Of Counsel:
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Statute

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

DENIA M. FAWCETT, Administratix of the Estate of Floyd S. Fawcett,

Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMANY,

Respondent.

ORIGINAL BRIEF OF RESPONDENT UPON PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

STATEMENT OF THE CASE

Decedent was killed December 4, 1961, while engaged in loading "piggy-back" trailers onto a railroad flat car at Kinder, Louisiana. He was crushed between two trailers

when a truck driver backing his truck failed to see decedent. (TR 118).

Decedent had been employed by Missouri Pacific Transport Company from September 30, 1939, until the date of his death. (TR 8).

Decedent was hired by the Transport Company, was paid by the Company, and his employment was covered by the Social Security Act and Fair Labor Standards Act. His employment was under the provisions of a contract between said Company and the Teamsters Union. His employment was covered by workmen's compensation and his widow received the benefits therefrom. (TR 8).

Although decedent was killed on Railroad premises, the premises were the subject of a lease agreement between the Railroad and the Transport Company. (TR 53, 104). No Railroad employees were present, nor did any such employee have any supervision of decedent or of decedent's supervisors. (TR 103-106). Decedent, through his supervisor, received his orders from the higher officials of the Transport Company. (TR 105, 106).

Decedent's work consisted of loading and unloading freight, which the consignee would otherwise do, and in assisting in the transport of freight over the highways.

Decedent's employer operated its business with the Railroad under a basic lease and operating contract. (TR 36-44). The premises at Kinder were also the subject of a lease. (TR 53).

The Transport Company is a Texas Corporation, licensed by the ICC to conduct highway transportation of

freight. (TR 10-14, 54). The Railroad is a Missouri corporation licensed by the ICC as a railroad carrier. (TR 11).

All of the capital stock of the Transport Company is owned by the Railroad. (TR 50-51). The Transport Company has eleven officers and the railroad forty-eight. Five of these fifty-nine officers are officers in both corporations. The Transport Company has seven directors and the Railroad fifteen. Three directors of the twenty-two directors are common to both corporations. (TR 143).

ARGUMENT

The Fifth Circuit Court of Appeals has previously held that summary judgment is properly granted in cases where it conclusively appears from the record, including affidavits and other supporting evidence, that there is no genuine issue as to material fact. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600 (5th Cir. 1960).

We do not burden this Court with further citation, but respectfully submit that this is a settled law.

Turning to the basic facts of this case, we immediately see that this Court has previously held that each case must be decided on its own peculiar facts. *Ward v. Atlantic Coast Line*, 362 U.S. 396, 80 S.Ct. 789 (1960). The question in each case is whether the railroad is or is not, the "employer" of the injured workman, within the meaning of the FELA.

The cases fall into two main categories. In the first, the question which is presented is whether or not the Rail-

road exercised such control and direction of the employee as to be termed his "employer" under the common law doctrine of Master and Servant. *Ward v. Atlantic Coast Line, supra; Restatement of Agency*, Sec. 220. Interesting discussions of this point are found in *DePaola v. New York & New Haven R.R. Co.*, 198 F.Supp. 12 (Conn. 1961), and *Valentine v. South Coast Corp.*, 218 F.Supp. 148 (E.D., La., 1963).

The District Judge, in his opinion (TR 136), and in his findings of fact (TR 142), resolved the question in favor of the Railroad and found that Fawcett was not the employee of the Railroad, under the theory of Master and Servant. We think he was correct, and do not burden this Court with an extended argument on the subject. The record fully substantiates the finding.

The second category of these cases involves a situation in which the injured employee is the primary employee of a third party, usually a contractor. The question to be resolved in this situation is whether or not, either by the contract itself, between the Railroad and the contractor-employer, or by the manner in which it is executed, the Railroad reserves such control over the activities of the employee as to be deemed his employer for the purposes of the FELA. *Del Vecchio v. Pennsylvania R.R. Co.*, 233 F.2d 2, 4 (3rd Cir. 1956); *Cimorelli v. New York City R.R. Co.*, 148 F.2d 575 (6th Cir. 1945).

Defendant, Missouri Pacific Railroad, in this suit, takes the position that the situation here is the same as that in the *Del Vecchio* case above cited. In the *Del Vecchio* case plaintiff was an employee of Northern Contracting

Company. Northern, under a written contract with the defendant Railroad, handled coal for the latter, for transshipment into seagoing vessels. The Court there was called upon to interpret the contract, and the manner of its execution, to determine whether or not the Railroad had such control over the plaintiff as to be his employer. In reaching a negative result, the Court quoted from the contract as follows:

> "The work to be performed by the Contractor under this agreement is to be done promptly and adequately in all respects, and in the performance of such work the Contractor will furnish all labor and supervisory force of every kind and description. And it is expressly understood and agreed that the Contractor shall be and remain an original private and independent contractor, hereunder, and shall employ, pay from its own funds, and discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees of the Contractor, and subject to its exclusive authority, supervision, direction and control." (233 F.2d 2, 3-4).

Paragraph 10 of our Railroad-Transport Company contract, found on page 42 of the transcript, contains language to the identical legal effect as the contract in *Del Vecchio*. It reads:

> "The contractor shall employ and direct all persons performing any service hereunder and such persons shall be and remain the sole employees of and subject to the control and direction of the Contractor, and not the employees or subject to the direction and control of the Railroad, it being the intention of the parties hereto that the Contractor shall be and remain an independent contractor and that

nothing herein contained shall be construed as inconsistent with that status."

We respectfully submit that these two contracts have the same effect, and that as such the Transport Company here is an independent contractor.

The only remaining question is to examine the manner in which the contract was executed, since this would govern over the written contract, especially in the event that the Railroad actually controlled the employee in the course of the work. As to this point, plaintiff produced, on November 21, the testimony of Fawcett's supervisor and his fellow workmen. (TR 93-128). This testimony is conclusive that no railroad personnel had anything to do with the work of Fawcett; that he was in fact directed and controlled by his supervisor, who in turn received his orders from the main office of the Transport Company, and that Fawcett was hired and paid by the Transport Company, not the Railroad. We can see none of the affirmative elements required for the relationship, as set out in the Restatement of Agency.

Some time after producing this evidence, plaintiff took the deposition of Courville, a fellow worker of Fawcett, and supplemented this with an affidavit, in an attempt to show control over Fawcett's activities by the defendant Railroad. (TR 60-81). Plaintiff's counsel has urged in his brief that this testimony shows such control. However, examination of the testimony merely reveals that the custom of obtaining bills of lading from railroad personnel and remitting freight receipts to them, when Transport personnel were away, the taking of messages for

freight orders, and similar activities, was merely a custom of operating the two different businesses in harmony and efficiency, rather than a situation of direction and control by railroad personnel of the Transport employees. (See TR 68-71). As to the testimony of the method of operation described at TR 79 and 80, we observe that if you or I, as shippers, desired to send freight via the railroad, we would be called upon to do just exactly what the Transport employees were called upon to do here.

Plaintiff relies on the cases of *Baker v. T & P R.R. Co.*, 357 U.S. 227, 79 S. Ct. 664 (1959); *Byrne v. Pennsylvania R.R. Co.*, 262 F.2d 906 (3rd Cir. 1959); *Mazzucola v. Pennsylvania R.R. Co.*, 281 F.2d 267 (3rd Cir. 1960), and *Cimorelli v. New York Central R.R. Co.*, 148 F.2d 575 (6th Cir. 1945), (followed by *Pennsylvania R.R. Co. v. Roth*, 163 F.2d 161 (6th Cir. 1947), cert. den. 332 U.S. 830, 68 S. Ct. 208, and *Pennsylvania R.R. Co. v. Barlion*, 172 F.2d 710 (5th Cir. 1949).

Plaintiff also relies on *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 78 S. Ct. 758 (1958), and *Leek v. B & O R.R. Co.*, 200 F.Supp. 368 (W. Va. 1962). However, as we will later demonstrate, these two cases are inapposite, dealing with another section of the FELA, and involving actual railroad employees.

Returning to the line of cases cited by plaintiff, commencing with the *Baker* case, we find that in each case there were certain factors of direct control of the employee under the Master and Servant doctrine. In *Baker*, the contractor had a contract with the railroad covering grouting services. However, the Court found that in the daily

course of the work, a railroad supervisor was present who actively directed the work of the individual workmen, including the amount of material to be used, the place of the work, and even when the equipment was to be moved to the next location.

Remembering that defendant's position relies on the *Del Vecchio* case in the 3rd Circuit, we find that plaintiff's cases of *Byrne* and *Mazzucola*, also decided by the 3rd Circuit, reached contrary results from the *Del Vecchio* case, but without encountering any difficulties as to the application of legal principles.

In the *Byrne* case, the employee was hired by Westinghouse, the contractor. However, the employee was under the direct supervision of a railroad supervisor, being on call twenty-four hours a day, and being directed as to just what work to do on each locomotive, and even on occasion riding locomotives while performing the duties of a fireman. Actually, in this case, the terms of the contract were not discussed, apparently not being material.

Likewise, in the *Mazzucola* case, the contract itself, with *Mazzucola's* primary employer, gave the railroad directive control of the work, including the right to take over and perform the work with its own forces whenever it deemed necessary.

In the *Cimorelli* case, also relied upon by plaintiff, although the contract with the Duffy Company purported to make it an independent contractor, the court found:

> "The whole project involved many independent details, the control of any one of which could not be

> surrendered without disorganization of the whole. From the very nature of the work its performance could not be committed exclusively to the discretion of the Duffy Co." 148 F.2d 575, 577.

Lastly, we distinguish the *Sinkler* and *Leek* cases relied on by plaintiff. All of the previous cases discussed here have dealt with Section 5 of the FELA, as to whether, by contract or otherwise, the railroad has sought to avoid the coverage of the FELA *as to someone in reality its employee.*

In the *Sinkler* and *Leek* cases, the injured workmen were in fact *regular employees of the railroad*, who were injured by third parties having a contract with the railroad. There the Court interpreted Section 1 of the FELA, in deciding that the third party were "agents" of the defendant railroads, under Section 1 of the FELA. In this case, plaintiff is asking the Court to say that an employee, ostensibly of a third party, is in fact the employee of defendant railroad.

Plaintiff's final theory is that through stock ownership of the Transport Company the Railroad has made it its "alter ego," and therefore is the employer of Fawcett and all the other Transport Company employees. The District Judge did not agree to this theory. We fully concur in his statement:

> "As we analyze it, plaintiff's real contention is that because the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company, was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad. The jurisprudence as we read it is to the contrary. *Atlantic*

Coastline R.R. Co. v. Shields, 5th Cir., 1955, 220 F.2d 242; *Garrett v. Southern R.R. Co.*, 6th Cir. 1960, 278 F.2d 424; *Kentucky Electric Power Co. v. Norton Coal Mining Co.*, 6th Cir. 1938, 93 F.2d 923; *Taylor v. Standard Gas & Electric Company*, 10th Cir. 1938, 96 F.2d 693." (TR 138, 139).

We further concur, and urge the logic of the District Judge upon this Court, that:

> "Plaintiff has alerted us to avoid intercompany arrangements drawn to avoid federal jurisdiction under the FELA. We find nothing here indicative of such a purpose, but we point out as did the Third Circuit (*Shaw v. Monessen Southwestern R.R. Co.*, 200 F.2d 841) that we should also be alert to avoid the extension of a statute applicable to railroad employees in interstate transportation to cover those engaged in other occupations. Such an extension might well deprive a widow and children, as it would here, of their rights under a state compensation act where their right of recovery would not depend upon proof of negligence." (TR 140).

Plaintiff would have the Court believe that the Railroad created the Transport Company only for the purpose of evading the FELA. However, as noted by the District Judge (TR 112), it is common knowledge that the Railroads have formed transport companies to meet the competition of the highway carriers and to make their business more convenient and attractive to the shippers.

Further, this extension of service involves *highway transportation*, not *rail transportation*. Fawcett was working with and around highway trailers and steerable, rubber-tired tractors to pull those trailers. We all know that

the purpose of the FELA is to protect railroad workers in their peculiar occupation.

To refuse summary judgment here would, in the future, burden the Federal Courts with many additional lawsuits. The Courts would be burdened, as it was in the *Mazzucola* case, with arguments as to whether the Safety Appliance Act applies to the brakes of a highway tractor and trailer combination. The possibilities approach the ludicrous. Is Interstate Highway 10 an "unsafe place to work", or is it "safe" while Highway 90 is not? Did the railroad "furnish" the highway, or did others? If Fawcett had been killed at a railroad crossing by a Missouri Pacific train, what type of action would he bring? Suppose it was a Southern Pacific crossing. Who to sue?

We respectfuly submit that this case falls within the purview of the cases of *Del Vecchio*, *DePaola* and *Valentine*, and that the authorities relied upon by plaintiff do not fit the case. We urge that the petition for the writ be denied.

Respectfully submitted,

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Dallas, Texas,
Attorney for Respondent.

By William C. Dowdy Jr

Of Counsel:
JOHN R. STEWART,
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Lake Charles, Louisiana.

CERTIFICATE

Dallas, Texas
September 20, 1965.

I hereby certify that a copy of the foregoing brief has this date been mailed to attorney for plaintiff, Mr. John A. Hickman, 419 Weber Bldg.

William C. Slowey, Jr.
Of Counsel for Respondent.